In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1388.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

CHARLES F. WHITE,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Respondent in Opposition.

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Opinion Below.

The opinion of the court below (Pet. App. A, pp. 1a-10a) is reported at Mass. Adv. Sh. (1977) 2805.

Jurisdiction.

The decision of the court below was entered on December 30, 1977. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3). The respondent respectfully suggests that the "judgment" of the court below is an inadequate basis for jurisdiction under 28 U.S.C. § 1257(3) because the judgment lacks finality.

Questions Presented.

1. Whether the decision of the Supreme Judicial Court of Massachusetts reversing a judgment of guilty and setting aside findings of a trial judge who denied in part a motion to suppress evidence in a criminal case is a final order under 28 U.S.C. § 1257(3).

2. Whether statements held inadmissible at trial because there was no intelligent waiver of *Miranda* v. *Arizona* safeguards may be used to establish probable cause for the issuance of a search warrant.

Constitutional Provisions Involved.

Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

The petitioner's statement of the case describing the proceedings below adequately sets forth the chronology of the state court proceedings.

Statement of the Facts.

The facts of this case are stated fully in the "Findings and Rulings in re Motion to Suppress Evidence" of the Massachusetts Superior Court trial judge (Petitioner's Appendix [Pet. App.] B, pp. 11a-19a) and the decision of the Massachusetts Supreme Judicial Court (Pet. App. A, pp. 1a-10a) and are adequately summarized in the Commonwealth's petition at pages 3-6.

Reasons for Denying the Writ.

I. THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS LACKS FINALITY AND IS NOT A FINAL JUDGMENT UNDER 28 U.S.C. § 1257(3).

It is settled that the Supreme Court of the United States has appellate jurisdiction of state litigation "only after the highest state court in which judgment could be had has rendered a '[f]inal judgment or decree.'" *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-477 (1975).

Respondent contends that since he is subject to further proceedings in Massachusetts, including a new trial, the Supreme Judicial Court's decision is not "final."

It is submitted that the denial of the motion to dismiss for lack of finality in *California* v. *Stewart*, 384 U.S. 436, 498 n. 71 (1966), did not create an unvarying rule that all decisions of a state's highest court concerning a motion to suppress evidence are final for purposes of jurisdiction under 28 U.S.C. § 1257(3). See, *e.g.*, *Cohen* v. *New York*, 385 U.S. 976 (1966).

Further, respondent contends that this Court's limitation in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547 (1949), that "we do not mean that every order fixing security is subject to appeal[; h]ere it is the right to security that presents *a serious and unsettled question*," (emphasis supplied) is applicable to the case at bar.

Moreover, the allowance of the writ of certiorari in the instant case would be contrary to the doctrine that this Court should decide constitutional questions only when necessary (see, *e.g.*, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71 (1948)), and could, by encouraging interlocutory appeals, result in overcrowding of this Court's docket.

II. THE SUPREME JUDICIAL COURT OF MASSACHUSETTS WAS PLAINLY CORRECT IN HOLDING THAT STATEMENTS OBTAINED WITHOUT A VALID WAIVER IN VIOLATION OF MIRANDA V. ARIZONA, 384 U.S. 436 (1966), MAY NOT BE USED TO ESTABLISH PROBABLE CAUSE TO OBTAIN A VALID SEARCH WARRANT.

Respondent contends that the theories underlying *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Wong Sun* v. *United States*, 371 U.S. 471 (1963), compel the conclusion that the unanimous decision of the Supreme Judicial Court was correct.

In *Miranda* v. *Arizona*, *supra*, this Court declared that until the required warnings and waiver are demonstrated at trial, no evidence obtained as a result of interrogation can be used against a defendant in a criminal trial. *Miranda*, *supra*, at 479.

In *Wong Sun* v. *United States*, *supra*, this Court stated that the test of the "fruit of the poisonous tree" doctrine was "whether, granting establishment of the primary il-

legality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, *supra*, at 488.

Additionally, this Court has stated that the *Wong Sun* rationale could be applied to Fifth Amendment violations. *Michigan* v. *Tucker*, 417 U.S. 433, 446-447 (1974).

This Court carved out exceptions to *Miranda* in *Harris* v. *New York*, 401 U.S. 222 (1971), and *Michigan* v. *Tucker*, 417 U.S. 433 (1974). In *Harris*, this Court held that statements of an accused taken without informing him of his right to counsel could be used for impeachment purposes at trial. In *Tucker*, the defendant had given a statement which was excluded because of improper *Miranda* warnings. This Court held, however, that the testimony of a witness whom the police discovered as a result of the defendant's statement was admissible.

Respondent contends that *Tucker* does not control the case at bar. Unlike the instant case, in *Tucker* the defendant did not accuse himself, *Michigan* v. *Tucker*, *supra*, at 449, and the police misconduct occurred prior to the decision in *Miranda*. *Tucker*, *supra*, at 447.

Moreover, it is submitted that, unlike the case at bar, in both *Harris* and *Tucker* the police misconduct violated only the prophylactic rules developed by *Miranda*. See *Michigan* v. *Tucker*, *supra*, at 446.

As the Maryland Court of Special Appeals has stated in applying *Wong Sun* v. *United States*, *supra*, to situations involving Fifth Amendment violations:

> "In the instant case, we do not have official action pursued in complete good faith, with the confession rendered inadmissible by the mere inadvertent omission of one of the prophylactic *Miranda* warnings. We have the confession being obtained in the absence of an effective waiver of the constitutional rights relating to self-incrimination and assistance of counsel to which appellant was entitled. The rationale of the holdings in *Harris* and *Tucker* does not apply to make admissible the tangible evidence obtained here, any more than it would apply to make admissible evidence derived from a confession not voluntary in the traditional sense." *In re Appeal No. 245 (75) from Cir. Ct. for Kent County*, 29 Md. App. 131, 349 A. 2d 434, 445 (1975).

Similarly, the respondent's statement in the case at bar was not the result of an inadvertent omission of the prophylactic *Miranda* warnings. It was the result of the willful questioning of the respondent, who "had affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to obtain such assistance" (Pet. App. B, p. 14a); had been "bouncing off the walls" (Pet. App. B, p. 14a); and was statutorily presumed to be intoxicated (Pet. App. B, p. 14a). This is a case where an admission was obtained by intentional questioning without a valid waiver.

It is submitted that, if the police are allowed to use illegally obtained confessions and admissions for clues rather than being required to amass evidence independently, then the warning requirements of *Miranda* would be meaningless, for the police would be permitted to accomplish indirectly what they could not achieve directly.

This Court, in *Miranda*, discussing the privilege against self-incrimination, stated that:

". . . [T]he constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona, supra,* 384 U.S. at 460.

Respondent submits that the unanimous decision of the Supreme Judicial Court of Massachusetts is correct in that it refuses to "sanction the initial violations of constitutional guaranties which . . . took place in the police barracks," *Commonwealth* v. *White,* Mass. Adv. Sh. (1977), 2805, 2812 (Pet. App. A, p. 7a), and upholds the "privilege against self-incrimination — the essential mainstay of our adversary system." *Miranda* v. *Arizona, supra,* at 460.

Conclusion.

For reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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